

BRIEFING

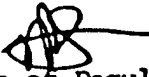
Memorandum

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE☐ ACTION☐ INFORMATION

DATE:

FILE: CO:R JPS

TO : Commissioner of Customs

FROM : John P. Simpson 
Director, Office of Regulations and Rulings

SUBJECT: Action Taken Under 19 U.S.C. 1307

This is in response to your question as to the adequacy of the evidentiary base available to support the action proposed pursuant to Section 1307 (Section 307 of the Tariff Act of 1930).

The proposed action is taken under the procedure described in 19 CFR 12.42(e), which provides:

"If the Commissioner of Customs finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of Section 307 is being, or is likely to be, imported, he will promptly advise all district directors accordingly and the district directors shall thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation." (emphasis supplied)

The cited language describes the adequacy of the evidentiary base required as a legal matter to support withholding of merchandise under Section 307. A successful legal challenge would require a showing that the information on which you relied did not reasonably indicate that goods subject to the order to withhold were made with proscribed forms of labor, in other words, that your finding was arbitrary, capricious, and without reasonable foundation.

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The current proposed action is based primarily on information from a creditable official source. Although CIA Director William Casey concedes in his May 19, 1983, letter to Senator William Armstrong that "we cannot determine the exact magnitude of the contribution forced labor makes to the total output of each industry...", nonetheless, the enclosure to Director Casey's letter consists of a "list of industries and products in which forced labor is used extensively." As a legal matter, information that forced labor is used "extensively" in the manufacture of certain products would appear to satisfy the evidentiary burden imposed by 19 CFR 12.42(e), even if the exact contribution of forced labor to the total output of those products is not certain.

With regard to the argument that goods imported into the U.S. cannot be shown to be the same goods which were produced with forced labor, there is no requirement in the statute or regulations for such a showing. Section 12.42 talks of a "class" of merchandise, not individual items of merchandise. Moreover, there is no requirement to show that merchandise made with forced labor is actually being imported into the U.S., merely that it is likely to be imported. That is, once a class of merchandise is found to be produced by extensive use of forced labor, it is not necessary to show that such merchandise is actually being imported. The restriction can be applied prospectively. This seems to be a rather pointless objection in any case, since unless such merchandise is actually imported it will never be affected by the restriction.

Finally, and I recognize that this is somewhat outside my brief, I would caution against the very dangerous suggestion that compliance with the clear requirements of duly-enacted laws should give way to notions of foreign or trade policy, however sensible those policies might be. If the statute at issue here is believed to be detrimental to the interests of the United States it should be revoked or amended to give policy officials greater discretion, but not ignored. At the risk of sounding pompous, it seems to me that the latter course of action places us on a footing no more elevated than the government at which the current action is aimed.